Seroja Anggerik Development Sdn Bhd v MHNB Reka Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12BNCVC-4–01 OF 2016
ZALITA ZAIDAN JC
14 JUNE 2017

Contract — Letter of intent — Whether constituted contract — Appellant intended to subcontract construction project to respondent vide letter of intent — Respondent commenced preliminary works — Appellant gave respondent formal offer for subcontract with lesser amount compared to letter of intent — Whether there was contract between parties — Whether preliminary works proven — Whether appellant responsible to pay damages — Whether learned judge erred in deciding burden was on appellant

Evidence — Hearsay — Document — Respondent claimed damages against appellant for preliminary work done in construction project — Respondent tendered letter for payment of deposit and deposit letter for supply of construction materials as evidence — Whether failure to call maker of documents would result contents of those documents as hearsay

The appellant had received a letter of intent from JKR ('JKR LOI') for a construction project ('the said project') with the contract sum of RM27,680,114.45. The respondent alleged that the appellant had subcontracted the said project to the respondent vide a letter of intent dated 29 January 2014 ('the appellant's LOI') for the sum of RM22,689,187 ('the original price'). The respondent had accepted the offer and commenced preliminary works. Dispute arose when the appellant refused to offer the said project to the respondent for the original price but instead offered to the respondent a lower price in the sum of RM21,680,114.45 ('the new offered price'). Consequently, the respondent brought an action against the appellant at the sessions court for damages together with interest in relation to works done as well as compensation for breach of contract. The learned sessions court judge ('the SCJ') allowed the respondent's claim, hence the present appeal. The appellant submitted that: (a) there was no legally binding contract as the appellant's LOI was not a contract between the parties; (b) the plaintiff failed to prove preliminary works amounting to RM450,000; and (c) the defendant was not responsible to pay damages amounting to RM550,000.

Held, dismissing the respondent's claim with costs:

(1) Based on the appellant's LOI, the construction of the words was clearly in plain language that it had no binding effect. The appellant's LOI was based on the JKR LOI which was subjected to the acceptance of tender and other conditions. Invitations to tender are not offers but are invitations to treat. Thus, the appellant's LOI which was subjected to the tender to be accepted by JKR could not be a concluded contract as yet. In addition, based on the evidence, the respondent had never accepted the new offered price for the subcontract works. Given that the wordings in the appellant's LOI were clear and free from any ambiguity and that the acceptance was never communicated to the offer made, it must follow that there was no contract (see paras 37–38, 54–55 & 59).

(2) There was no judicial appreciation of the law by the learned SCJ in deciding that the burden was on the appellant (the defendant in the court below) when it was the respondent (the plaintiff in the court below) who brought the suit claiming existence of the contract. The initial onus of proving the case is always on the plaintiff (see paras 59–60).

(3) In the present case, the summary bill of quantity ('the BQ') was tendered by the respondent but the contents could not be proven as there was no official stamp nor signature to prove that the BQ was prepared by the respondent's quantity surveyor. As for the letter for payment of deposit dated 7 February 2014 (exh P9) and deposit letter for supply of construction materials dated 10 March 2016 (exh P20), there were no corroborated evidence to proof for the payment made. Failure to call the maker of the document sought by the respondent would result the contents of those documents as hearsay. As there was no concluded contract and no proof for the preliminary works done, the claim for preliminary works must fail (see paras 70–71 & 74).

(4) In proving damages, real or factual evidence must be adduced as opposed to general estimations before a party can succeed in its claim. There was no evidence that a contract was ever concluded for the respondent to claim for loss of profit or estimation of profit from the contract value. In addition, the respondent did not produce any offers by others that had been rejected as claimed by the respondent. As there was no proof of damages as claimed, the damages of RM550,000 must fail (see paras 77 & 79–80).

[Bahasa Malaysia summary

Perayu telah menerima surat niat daripada JKR ('SN JKR') untuk projek pembinaan ('projek tersebut') dengan jumlah kontrak sebanyak RM27,680,114.45. Responden telah mengatakan bahawa perayu telah memberi subkontrak projek tersebut kepada responden melalui surat niat bertarikh 29 Januari 2014 ('SN perayu') untuk sejumlah RM22,689,187 ('harga asal'). Responden telah menerima tawaran itu dan memulakan kerja

awal. Pertikaian telah timbul apabila perayu enggan menawarkan projek tersebut kepada responden dengan harga asal tetapi sebaliknya menawarkan kepada responden harga yang lebih rendah berjumlah RM21,680,114.45 ('harga baru ang ditawarkan'). Berikutan itu, responden telah memulakan tindakan terhadap perayu di mahkamah sesyen untuk ganti rugi berserta faedah berkaitan kerja yang telah dilakukan dan juga pampasan kerana pelanggaran kontrak. Hakim mahkamah sesyen yang bijaksana ('HMS') telah membenarkan tuntutan responden, justeru rayuan ini. Perayu berhujah bahawa: (a) tidak terdapat kontrak yang mengikat kerana SN perayu bukan kontrak antara pihak-pihak; (b) plaintif telah gagal untuk membuktikan kerja awal berjumlah RM450,000; dan (c) defendan tidak bertanggungjawab untuk membayar ganti rugi berjumlah RM550,000.

Diputuskan, menolak tuntutan responden dengan kos:

(1) Berdasarkan SN perayu, pembentukan perkataan-perkataan tersebut jelas dalam Bahasa yang biasa yang tidak mempunyai kesan mengikat. SN perayu adalah berdasarkan SN JKR yang tertakluk kepada penerimaan tender dan syarat-syarat lain. Pelawaan untuk tender bukan tawaran tetapi pelawaan untuk tawaran. Oleh itu, SN perayu yang tertakluk kepada tender untuk diterima oleh JKR masih bukan kontrak yang selesai. Tambahan pula, berdasarkan keterangan, responden tidak pernah menerima harga baru yang ditawarkan untuk kerja subkontrak itu. Berdasarkan kata-kata dalam SN perayu adalah jelas dan bebas daripada apa-apa ketaksaan dan bahawa penerimaan itu tidak pernah diberitahu kepada tawaran yag dibuat, ia perlu diikuti bahawa tidak terdapat suatu kontrak (lihat perenggan 37–38, 54–55 & 59).

(2) Tiada penghargaan kehakiman berhubung undang-undang oleh HMS yang bijaksana dalam memutuskan bahawa beban adalah ke atas perayu (defendan di mahkamah bawahan) apabila ia adalah responden (plaintif di mahkamah bawahan) yang memulakan guaman menuntut kewujudan kontrak. Beban awal untuk memuktikan kes adalah sentiasa plaintif (lihat perenggan 59–60).

(3) Dalam kes ini, ringkasan bil kuantiti ('BK') telah ditender oleh responden tetapi kandungannya tidak dapat dibuktikan kerana tidak ada stem rasmi ataupun tandatangan bagi membuktikan bahawa BK itu telah disediakan oleh juruukur kuantiti responden. Berhubung surat untuk bayaran deposit bertarikh 7 Februari 2014 (eksh P9) dan surat deposit untuk bekalan bahan pembinaan bertarikh 10 Mac 2016 (eksh P20), tiada keterangan sokongan untuk membuktikan bayaran yang telah dibuat. Kegagalan untuk memanggil pembuat dokumen sepertimana dipohon oleh responden mengakibatkan kandungan dokumen tersebut sebagai dengar cakap. Oleh kerana tiada kontrak yang dibuat dan tiada

bukti kerja awal telah siap, tuntutan untuk kerja awal itu harus gagal (lihat perenggan 70–71 & 74).

(4) Dalam membuktikan ganti rugi, keterangan sebenar atau faktual perlu dikemukakan berbanding dengan anggaran umum sebelum suatu pihak itu boleh berjaya dalam tuntutannya. Tiada keterangan bahawa suatu kontrak telah dibuat untuk responden menuntut kerugian keuntungan atau anggaran keuntungan daripada nilai kontrak. Tambahan pula, responden tidak mengemukakan apa-apa tawaran oleh yang lain yang telah ditolak sepertimana dikatakan oleh responden. Oleh kerana tiada bukti ganti rugi sepertimana dituntut, ganti rugi RM550,000 harus gagal (lihat perenggan 77 & 79–80).]

Notes

For cases on document, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2171–2184.

For cases on letter of intent in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5946–5947.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (folld)

Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411; [2003] 4 CLJ 785, CA (refd)

Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195, CA (refd)

Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v Loo Ah Chew & Sons Sdn Bhd [2003] MLJU 139; [2003] 1 LNS 121, HC (refd)

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89, KBD (refd)

Convent Hospital Ltd v Eberlin & Partners (a firm) and others (1988) 14 ConLR 1, QBD (refd)

Hock Chuan Ann Construction Pte Ltd v Kimta Electric Pte Ltd [2000] 2 SLR 519, HC (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

JNA Ikhtisas Sdn Bhd v Kerajaan Malaysia [2015] 11 MLJ 257; [2015] 3 CLJ 1100, HC (refd)

Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd [1995] 1 MLJ 214; [1995] 3 CLJ 511, HC (refd)

Lay Hong Food Corporation Sdn Bhd v Tiong Nam Logistics Solutions Sdn Bhd [2017] MLJU 718, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (sebagai pelaksana wasiat/executor kepada SL Alameloo Achi alias Sona Lena Alamelo Acho, si mati) & Anor v Secure Plantation Sdn Bhd [2017] MLJU 379, FC (refd)

Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong [2002] 5 MLJ 247; [2002] 5 CLJ 170, HC (refd)

Malayan Flour Mills Bhd v Saw Eng Chee (Administrator of the Estate of Saw Cheng Chor, Deceased) & Anor [1997] 1 MLJ 763, HC (refd)
Mascom (M) Sdn Bhd v Panji Keagungan Sdn Bhd [2011] MLJU 1222; [2011] 1 LNS 1607, HC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635, HC (refd)
Preston Corp Sdn Bhd v Edward Leong & Ors [1982] 2 MLJ 22, FC (refd)
Proton Edar Sdn Bhd v Multioto Assist Sdn Bhd (formerly known as Support Growth Sdn Bhd) [2015] MLJU 2017, CA (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
RS & L Marine Sdn Bhd v Bras Ventures Bhd & Anor [2016] 12 MLJ 152; [2016] 9 CLJ 56, CA (refd)
Rajeswari Thedshanamurthy v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 88 (refd)
Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42; [2004] 3 CLJ 679, CA (not folld)
Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd [2011] 4 MLJ 593; [2011] 1 CLJ 105, CA (distd)
Tiverton Estates Ltd v Wearwell Ltd [1975] Ch 146, CA (refd)

Legislation referred to

Contracts Act 1950 s 7(a)
Evidence Act 1950 ss 101, 102, 103

Abdullah Az-Zubayr bin Awaluddin (Dayang Noor Ailani bt Puyungan Razali with him) (Zulpadli & Edham) for the appellant.
Florencia a/p Sandanasamy (Florencia & Partners) for the respondent.

Zalita Zaidan JC:

INTRODUCTION

[1] This is an appeal against the decision of the sessions judge which allowed the plaintiff's claim on 19 January 2016. The parties in this appeal are the appellant who was the defendant and the respondent was the plaintiff at the sessions court.

[2] For ease of reference, in this judgment, the parties will be referred to as they were in the sessions court.

BACKGROUND FACTS

[3] The relevant factual background giving rise to this appeal based on the written submission of the counsels may be briefly stated as follows:

(a) Seroja Anggerik Development Sdn Bhd, the defendant in this case, is a limited company registered in Bandar Baru Bangi, Selangor, was appointed by the Public Works Department, Malaysia to carry out a construction project. The plaintiff is a limited company registered in Malacca;

(b) JKR was the project owner via a letter of intent of 8 January 2014 offered a project known as 'menyiapkan baki kerja tertinggal bagi Projek membina jalan baru dari Lebuhraya Seremban Port Dickson ke laluan 5 di Pasir Panjang dan menaik taraf laluan 5 dari Pasir Panjang ke Linggi Negeri Sembilan (Seksyen 1)' known as 'the said project'. The defendant had received the Letter of Intent of 8 January 2014 from JKR with the contract sum for the project as RM27,680,114.45;

(c) the plaintiff claimed that the defendant, the main contractor for the said project had subcontracted through a letter of 29 January 2014, the said project to the plaintiff for the sum of RM22,689,187 which is disputed in this case. The letter is exh P11 (at pp 188–189 of the appeal record *Jld* 2 *Bahagian* C);

(d) the plaintiff claimed that the plaintiff accepted the offer by the defendant and commenced preliminary works where the details as claimed by the plaintiff in Table 1 below;

(e) JKR via letter dated 27 March 2014 approved the tender of the said project to the defendant. The plaintiff claimed that the said project was offered to the defendant by way of a letter of award to carry out the project for the sum of RM27,680,117.45;

(f) the plaintiff claimed that the defendant refused to offer the said project to the plaintiff for the original agreed price but instead insist that the defendant will be awarded only if the plaintiff accept the new offer for the sum of RM21,680,114.45. The defendant on the other hand stated that the defendant had offered the plaintiff a new contract value for the amount RM21,680,114.45 and the plaintiff did not accept the letter of intent nor the letter of offer from the defendant;

(g) the plaintiff claimed that the defendant breached the contract and the plaintiff had suffered loss amounting to RM1,084,005.23 which is 4.5% from contract sum. The plaintiff sued the defendants for the expenses incurred by the plaintiff for work done and damages for the wrongful termination and/or breach of promise;

(h) the sessions judge allowed the plaintiff's claims as follows:

(i) RM450,000 for the works done;

(ii) RM500,000 as compensation for breach of contract;

(iii) interest at the rate of 5% on the amount RM450,000 calculated

from 1 April 2014 to full settlement;

(iv) interest at the rate of 5% on the amount RM500,000 and/or on the said judgment sum until full completion; and

(v) cost for this action amounting to RM20,000;

(i) being aggrieved with the said decision, the defendant appealed to this court.

THE DEFENDANT'S SUBMISSION

[4] The learned counsel for the defendant orally submitted the three main grounds for appeal as provided in his written submission, namely:

(a) no legally binding contract existed;

(b) the plaintiff failed to prove the preliminary works amounting to RM450,000; and

(c) the defendant is not responsible to pay damages amounting to RM550,000.

[5] Based on the memorandum of appeal, the counsel for the defendant submitted that the sessions judge had erred in law and facts in considering the existence of a contract, the letter of intent of 29 January 2015 ('exh P11') as binding and relied on the case of *Mascom (M) Sdn Bhd v Panji Keagungan Sdn Bhd* [2011] MLJU 1222; [2011] 1 LNS 1607.

[6] It was submitted that the sessions judge had erred in law and facts, failing to consider the fact that, one acceptance letter (*surat setuju terima*) of 30 January 2014 ('exh P1') failed to be returned to the appellant within the stipulated time.

[7] The defendant submitted that the sessions judge had erred in law and facts in deciding that the plaintiff had commenced preliminary works, based on the summary bill of quantity ('BQ') ('exh P8'), the letter for payment of deposit (surat penerimaan pembayaran deposit) of 7 February 2014 (exh P9'), deposit letter for supply of construction materials (surat pembayaran deposit untuk membekal bahan binaan) dated 10 March 2016 ('exh P20'), photos ('exh P19') and witness's testimony SP2 without considering matters as follows:

(a) the exh P8 was an empty BQ without the stamp and signature of witness SP2. The SP2 had testified confirming the normal practice that the BQ

will be prepared by SP2 that has the stamp or SP2's signature;

(b) there was no supporting document for exh P9, a cheque or bank account to prove that payment had been received by SP2 whom said that the payment would be received through cheque or cash;

(c) the claim for project management consultant ('PMC') appointment to be RM65,000 but the payment made from the respondent to SP2 reflected the amount of RM40,000;

(d) the maker for the document exh P20 was not called to testify the validity of exh P20;

(e) the plaintiff failed to bring other evidence to support for instance invoice, purchase order or the details to prove the same of the materials ordered amounting to RM250,000;

(f) the claim by the plaintiff on the same of the works and deposit made to supplier amounted to RM350,000 but exh P20 only showed payment made was only for RM250,000;

(g) the photos as exh P19 are only photos of the site visit and meeting with Jabatan Kerja Raya ('JKR') representative only and no other evidence to support exh P19 that the photos were taken at the project site and the meeting held with JKR representative, without the date and time recorded; and

(h) that the feneral damages amounting to RM550,000 to be given to the plaintiff on the basis that plaintiff had rejected other job offers whereas this was never proven by the plaintiff in rejecting other offers. Learned counsel for defendant relied on the authority where claim for damages must be proven as in the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635 and *Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong* [2002] 5 MLJ 247; [2002] 5 CLJ 170.

THE PLAINTIFF'S SUBMISSION

[8] The plaintiff alleged that defendant had offered by letter on 29 January 2014 to subcontract the said project to the plaintiff for the contract value of RM22,689,187 and had stated that the contract value cannot be modified. The plaintiff commenced the preliminary works based on the LOI 29 January 2014 as in Table 1 below:

No	Particulars	Amount

1.	Site visits to ensure that the scope of the work is as stated in the bill of quantity. This includes making measurements at sites/exact measurement of the balanced work need to be done at the abandoned site. The number of visits to the site is approximately ten times.	RM20,000
2.	Appointment of project management consultant.	RM65,500
3.	Attending meeting at defendant's office (Seroja Anggerik Development Sdn Bhd).	RM3,500
4.	Attended Meeting with JKR, seven times to get confirmation on the price adjustment, scope of work and work specification.	RM5,000
5.	Making preliminary discussions with a number of supplier/provider/surveyor to establish reasonable rates, this is to maintain the increase in rates, especially the rate of work for premix and hence made a unrefundable deposit to the supplier.	RM350,000
6.	Meetings with En Nazri political secretary to meet with the deputy minister for JKR.	RM2,000
7.	Meeting with secretary to the deputy minister to expedite the project.	RM3,000
8.	Preparation for setting up 'site office' near to the site.	RM1,000
	Total	RM450,000

[9] The plaintiff alleged that on 12 March 2014, the defendant reduced the contract sum from RM22,689,187 to RM21,680,114.45.

[10] The plaintiff claimed for damages RM550,000 which is 2–2.5% of the contract sum and relied on the case of Court of Appeal, *Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593; [2011] 1 CLJ 105 at p 106.

DECISION OF THE SESSIONS COURT

[11] The sessions judge allowed the plaintiff's claims as in para 3(h) above and the decision is reproduced here in part as follows:

Alasan-alasan Penghakiman

1. Berdasarkan dari keterangan semua saksi dan eksibit-eksibit yang telah dikemukakan di dalam Mahkamah, Mahkamah mendapati bahawa Plaintiff mempunyai tuntutan yang kukuh *dan gagal dicabar oleh Defendan* di dalam

tuntutan ini. *Atas asas demikian, Mahkamah telah membenarkan tuntutan Plaintiff* terhadap Defendan bersama-sama dengan kos.

2. Tuntutan Plaintif adalah untuk kerja-kerja yang telah dilakukan sebanyak RMK 450,000 dan juga gantirugi sebanyak RM550,000. Tuntutan Plaintif sebanyak RM550,000 telah berjaya dibuktikan melalui eksibit P-8. Eksibit P-9, eksibit P-19 dan P-20. SP-2, Encik Mustafa Bin Osman telah memberi keterangan bahawa beliau bertanggungjawab membuat/menyediakan Bill of Quantity bagi membuktikan kerja-kerja yang dilakukan oleh Plaintif. SP-2 telah memberitahu Mahkamah di dalam keterangan beliau sendiri dan juga beberapa siri lawatan telah dibuat. Bill of Quantity adalah merupakan satu keterangan utama, dan it is a prime evidence. Fakta ini gagal dicabar oleh Defendan dengan bukti yang menunjukkan sebaliknya.

THE COURT'S FINDINGS

Whether there is a contract between the parties

[12] It was the plaintiff's contention that the LOI formed the contract between the defendant and the plaintiff. The plaintiff's claims were allowed at the sessions court on two grounds:

(a) the expenses incurred by the plaintiff for work done; and

(b) the damages for wrongful termination and/or breach of promise.

[13] At this appeal, the defendant contended that the LOI tendered as exh P11 (at p 188 of the appeal record *Jld* 2 *Bahagian* C) relied by the plaintiff as binding contract was not a contract between the defendant and the plaintiff.

[14] The learned counsel for the defendant referred the court to paras 2–3 of the LOI exh P11, the words, 'sukacita dimaklumkan bahawa Jabatan Kerja Raya Malaysia melalui Seroja Anggerik Development Sdn Bhd telah berhasrat untuk melantik syarikat tuan melaksanakan projek tersebut di atas dengan harga 22 juta' was not an affirmed or a resolute offer. The counsel for the defendant also pointed out to para 4 of the LOI which clearly stated that it was only a letter of intent and that the learned sessions judge had failed to take into consideration to the phrase:

surat ini hanyalah satu Surat Niat dan hendaklah tidak ditafsirkan dalam apa-apa jua sebagai mengikat syarikat tuan ke atasnya.

[15] As the content of the LOI had expressly stated as such, the learned counsel for the defendant submitted the authority *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214; [1995] 3 CLJ 511 and quoted Abu Mansor JCA whom stated that:

> On the first issue, we are of the view there is no merit in the appellant's contention that there was a concluded contract in the Letter of Intent. We uphold the learned trial judge's finding, on the evidence, when he held as referred to above that the RM37,971,570.27 was not a finalized contract sum and that the letter of intent dated 3 April 1985 was not a concluded contract.

[16] The counsel also referred to a High Court decision in the case of *Mascom (M) Sdn Bhd v Panji Keagungan Sdn Bhd* [2011] MLJU 1222; [2011] 1 LNS 1607 quoting Justice Asmabi's principle in interpreting a LOI with reference to an English case:

> 23. ... the effect and significance of a Letter of Intent had been discussed in the case of *Turiff Construction Ltd and Turiff Ltd v Regalia Knitting Mills Ltd* (1971) 9 BLR 20 QBD (at p 22 para 3) where His Lordship Judge Fay had this to say:
>
> > As I understand it such a letter is no more than the expression in writing of a party's intention to enter into a contract at a future date. Save in exceptional circumstance it can have no binding effect.

[17] The counsel for the defendant submitted that the plaintiff failed to reply to the LOI within the seven days requirement stipulated in the LOI and that the plaintiff failed to prove at the trial court that the said LOI which is exh P1 (p 190 of appeal record *Jld* 2 *Bahagian* C) was not returned to the defendant within the stated period.

[18] To this the counsel for the defendant claimed that the LOI could not be binding as the letter of award ('LA') by JKR was awarded only on 27 March 2014 to the defendant as the main contractor (at p 197 of appeal record) where the date of the site possession given was 28 April 2014.

[19] The defendant's counsel also submitted that proof of no contract was corroborated by the plaintiff's witness's statement (at p 112 of the appeal record *Jld* 1 *Bahagian* A and B) whom during the examination by the defendant's counsel agreed that the LOI was only an expression of desire to appoint. To this the defendant's counsel submitted to the court that as there was no reply to the letter of acceptance of 12 March 2014 ('exh P12') from the plaintiff, such conduct tantamounts to a rejection of acceptance which is corroborated by the evidence of plaintiff's witness SP3 (at p 120 appeal record *Jld* 1 *Bahagian* A & B) where upon questioning, 'En Zahari setuju atau tidak Surat Tawaran 12 Mac ini telah ditolak oleh pihak plaintiff?', the answer given was 'setuju'.

[20] The plaintiff on the other hand submitted that the LOI was binding as the defendant had stated that the price could not be changed. The plaintiff relied on the authority in relation to concluding a contract that is the case of *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42 at p 50; [2004] 3 CLJ 679

at p 688 *where the counsel submitted that there was a LOI by JKR to defendant and to the plaintiff and that before the contract is concluded, there was a lot of work where the BQ had to be prepared as materials' price could fluctuate. Counsel further submitted that the only reason that the contract could not proceed was the contract price was reduced.*

[21] The counsel for the plaintiff went on to say that the law now leans in favour of upholding bargains and submitted two new cases to support her argument that was not in the bundle of authorities, the case of *RS & L Marine Sdn Bhd v Bras Ventures Bhd & Anor* [2016] 12 MLJ 152; [2016] 9 CLJ 56 and *JNA Ikhtisas Sdn Bhd v Kerajaan Malaysia* [2015] 11 MLJ 257; [2015] 3 CLJ 1100.

ANALYSIS

[22] The heart of the matter is whether there was a contract between the parties to start with based on the LOI. It was not disputed that the plaintiff received a LOI from the defendant based on one letter of intent received by the defendant from JKR of 8 January 2014 (exh P10A, at pp 183–184, appeal record *Jld* 2, *Bahagian* C).

[23] It is pertinent that the main content of the letter of intent by JKR (exh P10A) being the owner of the said project to the defendant be reproduced here as follows:

SURAT NIAT

PROJEK: MENYIAPKAN BAKI KERJA TERTINGGAL BAGI PROJEK MEMBINA JALAN BARU DARI LEBUHRAYA SEREMBAN – PORT DICKSON KE LALUAN 5 DI PASIR PANJANG DAN MENAIKTARAF LALUAN 5 DARI PASIR PANJANG KE LINGGI NEGERI SEMBILAN (SEKSYEN 1)

Dengan hormatnya, saya merujuk kepada perkara di atas dan surat Kementerian Kewangan Malaysia rujukan S/L.KEW/PK.KI 2/700/810209/157/51-3 JLD 3 SK 2(4) bertarikh 18 Disember 2013 adalah berkaitan.

2. Sukacita dimaklumkan bahawa Kerajaan Malaysia melalui Jabatan Kerja Raya telah berhasrat untuk melantik syarikat tuan untuk melaksanakan projek tersebut di atas dengan harga *RM* dan tempoh siap kerja selama *12* bulan. Walau bagaimanapun penerimaan tender tersebut adalah tertakluk kepada persetujuan tuan kepada syarat berikut:-

2.1.1 Pihak tuan tidak boleh membuat sebarang perubahan harga, skop dan tidak layak untuk membuat sebarang tuntutan perbelanjaan tambahan dan kerugian sekiranya tawaran ini disetujuterima oleh pihak tuan.

3. Sila nyatakan persetujuan tuan secara rasmi dengan menandatangani dan disaksikan dengan sempurnanya surat disertakan ini dalam tempoh tujuh (7) hari daripada tarikh penerimaan surat ini, pihak kami menganggap pihak tuan tidak bersetuju untuk menerima tawaran ini dengan syarat yang telah dinyatakan.

4. Surat ini hanyalah satu Surat Niat dan hendaklah tidak ditafsirkan dalam apa-apa jua sebagai mengikat Kerajaan ke atasnya.

[24] The LOI from defendant to the plaintiff of 29 January 2014 can be found in exh P11 (at pp 188–189 of the appeal record *Jld* 2 *Bahagian* C) where some of the contents are reproduced here for ease of reference as follows:

2. Sukacita dimaklumkan bahawa Jabatan Kerja Raya Malaysia melalui Seroja Anggerik Development Sdn. Bhd. telah berhasrat untuk melantik syarikat tuan untuk melaksanakan projek tersebut di atas dengan harga RM22,689,187.00 dan tempoh siap kerja selama 12 bulan. Walau bagaimanapun penerimaan tender tersebut adalah tertakluk kepada persetujuan tuan kepada syarat berikut:

2.1.1 Pihak tuan tidak boleh membuat sebarang perubahan harga, skop dan tidak layak untuk membuat sebarang tuntutan perbelanjaan tambahan dan kerugian sekiranya tawaran ini disetujuterima oleh pihak tuan.

3. Sila nyatakan persetujuan tuan secara rasmi dengan menandatangani dan disaksikan dengan sempurnanya surat yang disertakan ini dalam tempoh tujuh (7) hari daripada tarikh penerimaan surat ini. Sekiranya pihak tuan tidak mengembalikan surat persetujuan dalam tempoh masa tujuh (7) hari daripada tarikh penerimaan surat ini, pihak kami menganggap pihak tuan tidak bersetuju untuk menerima tawaran ini dengan syarat yang telah dinyatakan.

4. Surat ini hanyalah satu Surat Niat dan hendaklah tidak ditafsirkan dalam apa-apa jua sebagai mengikat syarikat tuan ke atasnya.

[25] On 12 March 2014, the defendant offered to the plaintiff a subcontract works for the agreed contract sum for RM21,680,114.45 and stated that the bill of quantity will be based on a provisional sum. The offer letter marked as exh P12 (at p 195 of appeal record *Jld* 2, *Bahagian* C) is reproduced here in parts as follows:

MENYIAPKAN BAKI KERJA TERTINGGAL BAGI PROJEK MEMBINA JALAN BARU ...

PER: Surat Tawaran Kerja Sub-kontraktor

Mohon saya merujuk mengenai perkara di atas.

2. Dengan ini pihak kami ingin menawarkan kerja-kerja sub-kontraktor di atas berdasarkan harga yang telah dipersetujui iaitu sebanyak RM21,680,114.45 (Ringgit Malaysia Dua Puluh Satu Juta Enam Ratus Lapan Puluh Ribu, Satu Ratus Empat Puluh Empat Dan Empat Puluh Lima Sen Sahaja). Seperti mana dilampirkan di dalam Senarai Harga (B.Q), berdasarkan kuantiti sementara (provisional sum). Ianya juga akan tertakluk sebagaimana surat tawaran daripada Jabatan Kerja Raya Malaysia.

3. Pihak syarikat (Seroja Anggerik Development Sdn. Bhd) bersetuju membuat pembayaran kepada pihak sub-kontraktor (MHNB REKA SDN BHD) secara 'Deed of Assignment' seperti dinyatakan di dalam lampiran kontrak Jabatan Kerja Raya Malaysia – 'Lampiran J/C-7'.

4. Segala syarat-syarat lain akan dibincangkan kemudian, setelah pihak syarikat (Seroja Anngerik Development Sdn Bhd) mendapat surat tawaran dari Jabatan Kerja Raya Malaysia.

5. Pihak kami berharap agar pihak tuan dapat melaksanakan segala kerja-kerja di atas secepat mungkin dan mengikut segala keperluan spesifikasi Jabatan Kerja Raya Malaysia.

[26] JKR wrote to the defendant on the approved tender on 27 March 2014 with the letter of acceptance known as 'surat setuju terima' dated 27 March 2014 (exh P21 at pp 197–209 of appeal record *Jld* 2 *Bahagian* C). Briefly, among the salient requirements based on the tender acceptance and letter of acceptance are as follows:

(a) date of possession of site: 28 April 2014;

(b) completion date: 27 April 2015;

(c) defect liability period: 12 months;

(d) performance bond at the rate of 5% from contract sum that is RM1,384,005.72 to be submitted before or not later from date of possession of site;

(e) insurance public liability policy to be borne by contractor minimum RM1,000,000 for the period 28 April 2014–10 August 2016 within 30 days from date of cover note;

(f) insurance policy for the works at RM27,680,114.45 to be available within three months from date of possession of site;

(g) the contract document must be signed within four months from the date of letter of acceptance and that the defendant is to implement the formalisation of the contract document and prior to that the tender and the letter of acceptance is considered as binding between the defendant and the government;

(h) the letter of acceptance of 27 March 2014 stated at para 3 that the contract value of RM27,680,114.45 is retained and does not change; and

(i) the letter of acceptance of 27 March 2014 was signed by the defendant on 31 March 2014.

[27] Based on the facts submitted, the events leading to this appeal can be unfolded into a chronology order. There was a LOI from the defendant to the plaintiff based on JKR's LOI to the defendant (exh P10A). The JKR's letter of intent clearly stated that the Government of Malaysia through JKR is desirous to appoint the defendant on the condition to the acceptance of the tender that no change can be made to the price, value and additional cost or losses.

[28] Paragraph 3 of the LOI exh P10A specifically stated that the defendant is to return the letter accompanying the LOI which bears the same reference number and date in accepting the offer and non-returning of the letter will be assumed as non-acceptance. The letter was returned to JKR, filled and signed on 15 January 2014 (exh P10B, at p 185 of the appeal record *Jld 2 Bahagian* C) by the defendant.

[29] The letter to accept the offer as returned again provides the statement that the defendant will not make any changes to the contract sum, the scope and any claims for additional cost and losses:

> Pihak kami juga tidak akan membuat sebarang perubahan harga, skop dan sebarang tuntutan perbelanjaan tambahan dan kerugian.

[30] In comparison to the defendant's LOI (exh P11) received by the plaintiff, my careful perusal finds that it is almost a perfect replica of the letter of intent exh P10A. The exact words of no change to the contract value and that the letter of intent is not intended to be binding, is expressly provided. The standard notice to accept the LOI (at p 190 of appeal record *Jld* 2 *Bahagian* C) accompanying the LOI is of similar format to JKR's.

[31] The LOI exh P11 between defendant and the plaintiff clearly stated that the defendant is desirous to appoint the plaintiff as the subcontractor for the contract value of RM22,689,187. The remaining words at para 2 of exh P11 informing plaintiff that the tender acceptance is subjected to the plaintiff's agreement to the condition that the plaintiff cannot make any changes to the price, scope (works) and is not qualified to make a claim for additional cost and losses in the event the offer is accepted by the plaintiff.

[32] The letter of intent is at the very early stage of negotiation where the tender has yet to be agreed upon and approved by JKR. The contractual relationship between the main contractor and its subcontractors as simply explained by Sundra Rajoo and Harbans Singh KS, *Construction Law in Malaysia* (2012), unless expressly prohibited under the construction contract, the main contractor is free to sublet portions of works to other parties to carry them out for and on his behalf and may consist of various types of works depending on their particular method of appointment and the ultimate contractual arrangement entered into.

[33] In most building contracts, it is a normal practice to see a fair amount of negotiation taking place over the terms of contract. The case of *Hock Chuan Ann Construction Pte Ltd v Kimta Electric Pte Ltd* [2000] 2 SLR 519 is instructive as the court was invited to make sense out of a mass of facts concerning the negotiations carried out by the parties with a view of

A determining whether a subcontract is formed as prescribed by the legal principles.

B **[34]** So much so, the elements pertinent to contract value or the price, the supply of construction materials and contractor's responsibilities during contract period may take time to be finalised particularly involving government procurement within an approved budget before the offer or proposal can be extended to a party by the other.

C **[35]** At this juncture, if this line of argument by plaintiff is to be followed that there was a contract, I cannot disregard the fact that the negotiation has yet to be finalised for the contract to be effectively implemented and operationalised by both parties. More particularly, the offer between defendant and plaintiff has to be certain as it must be in accordance with the terms D specified by JKR before an acceptance can be communicated.

[36] This is important as the offer is the first element in the chain of events leading to a construction contract. The offer must consist of a definite proposal in clear terms capable of resulting in a binding agreement once it is accepted as E decided in the Federal Court in *Preston Corp Sdn Bhd v Edward Leong & Ors* [1982] 2 MLJ 22. In that case, the wording of the quotation issued to the customer and printing orders were studied in determining the formation of the contract. It was held that the printing order constituted an offer and its confirmation by the respondents constituted acceptance which concluded a F contract.

[37] Therefore the effect of a letter of intent depends upon the objective meaning of the words used. Based on the defendant's LOI to the plaintiff, the construction of the words are clearly in plain language that it has no binding G effect. The LOI by defendant to the plaintiff was based on JKR's letter of intent which is subjected to the acceptance of tender and other conditions.

H **[38]** Invitations to tender are not offers but are invitations to treat. This tender process was aptly put by Bingham LJ in the case of *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 at p 1202:

> A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. ... The I invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; ...

Therefore this court finds that the LOI which is subjected to the tender to be accepted by JKR could not be a concluded contract as yet.

[39] A letter of intent which provides the statement 'subject to contract' had been decided where in the words of Lord Denning in the case of *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146 at p 159:

> ... for over a hundred years, the courts have held that the effect of the words 'subject to contract' is that the matter remains in negotiation until a formal contract is executed ...

[40] I stand to be guided by the decision of the Supreme Court in the case of *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 which had decided on the status of a letter of intent. In that case, YC Chin entered into negotiations with Malaysia Mining Corp Bhd, a majority shareholder of Ayer Hitam, to develop and construct low cost houses and shophouses for Ayer Hitam's workers. On 19 September 1984, Ayer Hitam wrote to YC Chin accepting YC Chin's proposals in undertaking the project but subject to certain terms and conditions stipulated in the letter. One of the terms was that there be a formal agreement in writing entered into between the parties incorporating all the terms proposed by Ayer Hitam.

[41] The Supreme Court held that essential matters referred to the letter still remained to be settled between the parties and the condition that a formal written agreement be executed was yet to be fulfilled, the letter did not constitute a contract binding in law but was only a record of terms upon which they were agreed upon as a basis for the negotiation of a contract.

[42] Interestingly the counsel for the plaintiff said that the law tends to lean in favour of upholding bargains and relied on two authorities to support her argument. However what the counsel for the plaintiff did not do was to make reference to the Supreme Court decision in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133 that was referred in the case submitted to this court, *JNA Ikhtisas Sdn Bhd v Kerajaan Malaysia* [2015] 11 MLJ 257; [2015] 3 CLJ 1100.

[43] Based on *Ayer Hitam Tin Dredging* case, it is settled law that when an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract' and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is entered into.

[44] There is a striking difference between the case of *JNA Ikhtisas Sdn Bhd* and *Ayer Hitam Tin Dredging* case where in the former, the defendant clearly intended the plaintiff to render services under a direct negotiated contract.

[45] Although the case of *RS & L Marine Sdn Bhd v Bras Ventures Bhd &*

Anor [2016] 12 MLJ 152; [2016] 9 CLJ 56 was referred by the counsel for the plaintiff, this court takes the stand that the case must be read as a whole and not in extraction. The *RS & L Marine Sdn Bhd* case was about the defendant, Bras Ventures who were trying to secure a project with TNB expressed the desire to award a portion of the works known as 'Kerja-Kerja HDD merentasi Sungai Manjung, Perak' to the plaintiff, RS & L Marine as the subcontractor. The plaintiff has the experience and equipment to carry out the works in particular the use of horizontal directional drilling (HDD). While the terms of payment of the contract price were being negotiated, the defendant conveyed their intention not to proceed with the subcontract with the plaintiff.

[46] The Court of Appeal stated that when the defendant informed TNB that they had appointed the plaintiff as the subcontractor, it was nothing more than that and it does not tantamount to prove that all the fundamental elements of a valid contract had been established *consensus ad idem* on the terms of payment of the contract price. In that regard, the Court of Appeal held that there was no concluded subcontract reached between Bras Ventures and the plaintiff.

[47] It is for the plaintiff to prove that there was communication in accepting the LOI of the defendant in order not to treat the negotiation between the parties as still open to process of bargaining. Based on the submission by the defendant's counsel on proof of no contract, this court finds that it is corroborated by the plaintiff's witness (see p 112 of the appeal record *Jld* 1 *Bahagian* A and B) whom agreed that the LOI was only an expression of desire to appoint and not a contract.

[48] Reverting to the evidence given by the plaintiff's witness, he admitted upon questioning:

Q: Maksudnya surat ini ditulis 'Surat Niat' tetapi Encik Zahari baca tiba-tiba menjadi Surat Tawaran pula. Setuju?

A: Surat Niat tetap surat niat.

Q: Setuju atau tidak, Surat ini menyatakan bahawa Seroja Anggerik hanya berhasrat untuk melantik dan bukan melantik pihak Plaintiff. Setuju atau tidak?

A: Ya (witness nod his head).

[49] It is of the court's view that it is for the plaintiff to prove on the balance of probabilities that the contract exist before this court can delve into the second and third grounds of appeal.

[50] Reverting to the dispute, the plaintiff claimed that the defendant offered to the plaintiff via letter of 29 January 2014 for the price of RM22,689,187 and the plaintiff claimed that it had accepted the offer. However the plaintiff could not produce any evidence that the acceptance letter to the LOI was returned to the defendant.

[51] In the defendant's defence, it was stated that a meeting took place between the defendant and the plaintiff on 12 February 2014 where the contract value was discussed and plaintiff was offered with a new contract price of RM21,680,114.45. The defendant had issued the offer letter of 12 March 2014 with the new contract price of RM21,680,114.45. The defendant claimed that there was still no acceptance from the plaintiff.

[52] Based on the facts and the evidence tendered, the letter 12 March 2014 (exh P12 at p 195 of the appeal record *Jld* 2 *Bahagian* C) was an offer letter to the plaintiff for the subcontract work at the price of RM21,680,114.45. It specifically stated that the bills of quantity ('BQ') is based on provisional sum which is subjected to the offer letter of JKR, the payment to the plaintiff will be by way of deed of assignment and the other conditions will be discussed at a later stage upon receiving the offer letter from JKR.

[53] The defendant's counsel submitted that the defendant had wrote to the plaintiff on 4 April 2014 in reply to the plaintiff's letter of 25 March 2014 denying the preliminary works of RM450,000 as the defendant has yet to be appointed by JKR (exh P18 at p 210 of the appeal record *Jld* 2 *Bahagian* C). The defendant also submitted that the plaintiff did not reply to the offer letter of the defendant which is as shown in defendant's letter of 29 April 2014 (at p 213 of the appeal record *Jld* 2 *Bahagian* C), the plaintiff was given three days to reply to the offer made by the defendant.

[54] Based on the foregoing, the evidence produced proved that the plaintiff did not accept the new offered price for the subcontract works. In addition, this court is of the view that the plaintiff in disagreeing initially to the contract value offered by the defendant at RM22,689,187 may amount to a rejection of the defendant's offer.

[55] If the plaintiff disagreed and had introduced a new contract value or had insisted on the original price, he would then be making a counter-offer. A counter-offer not only fails as an acceptance but it also amounts to a rejection of the original offer: *Malayan Flour Mills Bhd v Saw Eng Chee (Administrator of the Estate of Saw Cheng Chor, Deceased) & Anor* [1997] 1 MLJ 763 at p 773. This court finds that the plaintiff had never accepted the new offer by the defendant.

[56] Generally a contract is formed when there is an offer that has been accepted and the terms agreed to must enable the parties to perform the contract. The acceptance of the offer should be absolute and unqualified to be effective in order to satisfy the need to achieve the *consensus ad idem* criteria following s 7(a) of the Contracts Act 1950. This point of law had been decided in the case of *Rajeswari Thedshanamurthy v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 88.

[57] The case of *RS & L Marine Sdn Bhd* case is similar with the instant case with regards to the fact that the contract value and other vital terms of the contract particularly the site possession to commence with the works have yet to be finalised between plaintiff and defendant. JKR's approved tender and the letter of acceptance of 27 March 2014 proved to show that no prior contract or agreement could exist as the site possession was given after the date of JKR's letter of acceptance to the defendant which is 28 April 2014.

[58] In this regard, counsel for the plaintiff's submission of the case *Sinar Wang Sdn Bhd v Ng Kee Seng* cannot be relied upon as there was an offer made in this case after the issuance of LOI from the defendant. The fact still remain that the plaintiff could not prove acceptance of the offer and thus commencement of the preliminary works. Alternatively, the plaintiff may have jumpstart the construction which is illegal but this matter was not pleaded on the defendant's part.

[59] Given that the wordings in the LOI are clear and free from any ambiguity and that the acceptance was never communicated to the offer made, it must follow that there was no contract. The existence of a contract has yet to be proven by the plaintiff. This translates to what is simply the fact that there was no judicial appreciation of the law by the learned sessions judge in deciding that the burden is on the defendant when it was the plaintiff who brought the suit claiming that a contract exist. In her first part of her decision she stated that:

> Berdasarkan dari keterangan semua saksi dan eksibit-eksibit yang telah dikemukakan di dalam mahkamah, mahkamah mendapati bahawa plaintiff mempunyai tuntutan yang kukuh dan gagal dicabar oleh defendan di dalam tuntutan. Atas asas demikian, mahkamah telah membenarkan tuntutan plaintiff terhadap defendan bersama-sama dengan kos.

[60] The initial onus of proving the case is always on the plaintiff. The plaintiff, at the start of the plaintiff's case, has the legal burden of proving the existence of any relevant fact and the evidential burden of some evidence of the existence of such fact. The law on the burden of proof can be found in a plethora of cases and the decision of the Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (sebagai pelaksana wasiat/executor kepada SL*

Alameloo Achi alias Sona Lena Alamelo Acho, si mati) & Anor v Secure Plantation Sdn Bhd [2017] MLJU 379 had extensively discussed the burden of proof with ss 101–103 of the Evidence Act 1950 and made reference to an earlier Federal Court case of *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86.

[61] Based on the *Letchumanan Chettiar Alagappan @ L Allagapan* case, s 101 is the burden to establish the case which rests throughout on the party who asserts the affirmative of the issue while the 'burden of proof' in s 102 of the Evidence Act 1950 is the burden to adduce evidence, to rebut the claim in order to discharge the burden of proof. The Federal Court judge Salleh Abbas in the *International Times* case stated that:

> The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[62] Based on the facts and the law before me, there was no valid contract, less so any breach thereof. The first issue has been answered in the negative and I can disregard the second and third issues as irrelevant to be answered. However for the purpose of completeness, I will give my grounds for the rest of the issues in my judgment.

PRELIMINARY WORKS AMOUNTING TO RM450,000

[63] The learned counsel for the defendant submitted that the plaintiff had failed to prove the preliminary works of RM450,000. The counsel submitted in his written submission that the sessions judge had erred in law and in facts upon deciding that plaintiff had successfully proven through the summary bill of quantity as in exh P8, letter of payment of deposit (*surat penerimaan pembayaran deposit*) of 7 February 2014' (exh P9), letter of deposit payment for supply of construction materials (*surat pembayaran deposit untuk membekal bahan binaan*) of 10 March 2016 (exh P20), the photos (exh P19) and on the witness's (SP2) statement.

[64] The counsel for the defendant submitted that the plaintiff in claiming for the loss due to the preliminary works must prove loss and relied on a number of authorities: *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411; [2003] 4 CLJ 785, a Court of Appeal decision; *Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v Loo Ah Chew & Sons Sdn Bhd* [2003] MLJU 139; [2003] 1 LNS 121; *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635; and *Letrik*

Bandar Hup Heng Sdn Bhd v Wong Sai Hong [2002] 5 MLJ 247; [2002] 5 CLJ 170.

[65] The preparation of the BQ was claimed to be made by the plaintiff's witness (a diploma holder in quantity surveyor (QS)) whom stated that the BQ must be stamped by the person who prepared it. The counsel for the defendant pointed out to the court that no stamp was found on the BQ to show that the witness prepared the BQ (at pp 98–99 of appeal record) and therefore there was no proof that the BQ was prepared by the plaintiff's witness. The counsel for the defendant submitted that it was a mere empty BQ and the witness could not prove that he prepared the BQ.

[66] The counsel for defendant submitted on the evidence adduced by the plaintiff as follows:

(a) the photos tendered as exh P19 (at pp 230–242 of appeal record *Jld* 2 *Bahagian* C) could not be proven as they were just pictures of a visit of the site and meeting with JKR only;

(b) on the deposit for the appointment of a project management consultant, no receipts were produced and the letter of 7 December 2014, only mentioned the amount of RM40,000 whereas the claim is for RM65,000 (at p 120 of appeal record *Jld* 1 *Bahagian* A and B); and

(c) on exh P20, the deposit for supply materials of RM250,000 no proof given for the deposit as paid (at p 194 appeal record *Jld* 2). The maker of the letter was not called but upon questioned by the defendant's counsel (at p 153 of appeal record *Jld* 2), the reply was that the payment of deposit was partly by cheque and partly by cash. The counsel for the defendant submitted that it was such an enormous amount but no receipt could be produced in court and there is a discrepancy as the amount claimed was RM350,000.

[67] Counsel for the defendant relied on the authority *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 where it was held that when a document is sought to be proved to establish the truth of the facts contained in it, the maker has to be called and failure to call will result in the contents of the documents being hearsay.

ANALYSIS

[68] The counsel for the plaintiff' had submitted in her written submission (at para 10), stating that the plaintiff prepared the BQ for RM27m which is 'duly accepted by JKR'. However, this court has difficulty in believing for the reason that the accepted tender was awarded to the defendant only on 27 March 2014 and the given date of site possession was 28 April 2014.

[69] Richard Wilmot-Smith QC in *Construction Contract, Law and Practice* (2nd Ed) explained that the BQ is a method of valuation where the contractor is provided with the means for work to be progressively valued. Indeed it is an important document. The English case of *Convent Hospital Ltd v Eberlin & Partners (a firm) and others* (1988) 14 ConLR 1 at p 6 explained the various purpose of a BQ where for instance in a tender process, it will be an investigation whether the employer will recommend the contractor for the work and whether the contractor will undertake the various items at the prices shown by the contractor.

[70] The BQ is an important document which is part of the contract in construction projects and therefore it must be proven that the prices shown are as inserted and justified normally by a qualified quantity surveyor. In this case, the BQ was tendered by the plaintiff but the contents could not be proven as there was no official stamp nor signature to prove that the BQ was prepared by the plaintiff's QS.

[71] For exh P9 and exh P20, there were no corroborated evidence to proof for the payment made. I have to agree with the counsel for the defendant based on the case of *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579, failure to call the maker of the document sought by the plaintiff will result the contents of those documents as hearsay.

[72] In relation to the photos ('exh P9'), my careful scrutiny of the photos find that there was no other evidence to corroborate that the photos had been taken at the site project for the preliminary works to be carried out. There was no date and time recorded. In addition, the plaintiff could not produce the site meeting minutes which would capture the discussion for the preliminary works to be carried out.

[73] The court had in her mind that if the plaintiff could prove that the preliminary works had been carried out prior to formalisation of a written contract, the plaintiff would be able on the principle of *quantum meruit* claim for the actual work done. However the claim under principle of quantum meruit must be pleaded: *Proton Edar Sdn Bhd v Multioto Assist Sdn Bhd (formerly known as Support Growth Sdn Bhd)* [2015] MLJU 2017 which was not pleaded on the part of the plaintiff. In addition, the principle of *quantum meruit* applies when there was no formal contract executed which is not as alleged by plaintiff.

[74] This court finds that as there was no concluded contract and no proof for the preliminary works done, the claim for preliminary works must fail.

A DAMAGES AMOUNTING TO RM550,000

[75] It was the plaintiff's contention that the plaintiff ought to have received the profit based on 15% of the contract value for the said project. The defendant's counsel submitted that the defendant is not responsible for the B damages of RM550,000 and the reason that the plaintiff had rejected other offers was never proven by the plaintiff. During the cross-examination, the plaintiff submitted that he is claiming for 2.5% when he should be getting 15%.

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[76] The counsel for the defendant submitted based on the number of cases relied, *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* and *Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong* that there must be proof for damages. It was also submitted that the learned sessions judge had D erred in law in relying on the case of *Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593; [2011] 1 CLJ 105 in allowing the claim for damages of RM550,000.

[77] In proving damages, real or factual evidence must be adduced as E opposed to general estimations before a party can succeed in its claim: *Lay Hong Food Corporation Sdn Bhd v Tiong Nam Logistics Solutions Sdn Bhd* [2017] MLJU 718.

F **[78]** I wish to state here the famous words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89 which cannot be resisted:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, G throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[79] In this case, this court finds that there was no evidence that a contract was ever concluded for the plaintiff to claim for loss of profit or estimation of H profit from the contract value. In addition, the plaintiff did not produce any offers by others that had been rejected as claimed by the plaintiff.

[80] This court disagrees with the sessions judge's reference to the case *Tanjung Tiara* case as it differs from this case. In *Tanjung Tiara* case it was an I appeal on the assessment of damages where the issue of liability was not decided before the Court of Appeal. Furthermore, the evidence adduced to support the plaintiff's claim for damages in that case was based on defendant's own computation in its third party contract as a basis. In the instant case, there was no method of calculation and it was the plaintiff's own basis to make the

computation at 2.5%. As there is no proof on damages as claimed, the damages of RM550,000 must fail.

[81] For the reasons stated above, I am unable to agree with counsel for the plaintiff that there exist a contract between the parties. There was no concluded contract, the claim for preliminary works and damages must fail. The plaintiff's claim is dismissed with cost.

Respondent's claim dismissed with costs.

Reported by Dzulqarnain Ab Fatar